



6355-01-M

CONSUMER PRODUCT SAFETY COMMISSION

[CPSC Docket No. 12-C0005]

E & B Giftware LLC, Provisional Acceptance of a Settlement Agreement and Order

AGENCY: Consumer Product Safety Commission

ACTION: Notice

SUMMARY: It is the policy of the Commission to publish settlements which it provisionally accepts under the Consumer Product Safety Act in the Federal Register in accordance with the terms of 16 C.F.R. § 1118.20(e). Published below is a provisionally-accepted Settlement Agreement with E & B Giftware LLC, containing a civil penalty of \$550,000.00, of which \$50,000 shall be suspended, within twenty (20) days of service of the Commission's final Order accepting the Settlement Agreement.

DATES: Any interested person may ask the Commission not to accept this agreement or otherwise comment on its contents by filing a written request with the Office of the Secretary by (insert date that is 15 calendar days from publication date).

ADDRESSES: Persons wishing to comment on this Settlement Agreement should send written comments to the Comment 12-C0005, Office of the Secretary, Consumer Product Safety Commission, 4330 East West Highway, Room 820, Bethesda, Maryland 20814-4408.

FOR FURTHER INFORMATION CONTACT: Regan A. Sweeney, Trial Attorney, Division of Compliance, Office of the General Counsel, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, Maryland 20814-4408; telephone (301) 504-7831.

SUPPLEMENTARY INFORMATION: The text of the Agreement and Order appears below.

December 19, 2011

(Date)

Todd A. Stevenson

Secretary

**UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION**

In the matter of:)	
)	
E & B GIFTWARE LLC)	
)	
)	CPSC Docket No.: <u>12-C0005</u>
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SETTLEMENT AGREEMENT

1. In accordance with 16 C.F.R. 1118.20, E&B Giftware LLC (“E&B”) and staff (“Staff”) of the U.S. Consumer Product Safety Commission (“Commission” or “CPSC”) hereby enter into this Settlement Agreement (“Agreement”) under the Consumer Product Safety Act (“CPSA”). The Agreement and the incorporated attached Order resolve Staff’s allegations set forth below.

THE PARTIES

2. Staff is the staff of the CPSC, an independent federal regulatory agency established pursuant to, and responsible for the enforcement of, the CPSA, 15 U.S.C. §§ 2051-2089.

3. E&B Giftware LLC is a limited liability corporation, organized and existing under the laws of the State of Delaware, with its principal corporate office located in Yonkers, New York. E&B Giftware LLC is a parent to many other companies, including but not limited to, EB Brands, Inc. (hereinafter, “EB”).

STAFF ALLEGATIONS

4. Between January 2000 and October 2008, EB imported and distributed approximately 3 million (3,000,000) of the subject exercise balls under the following brand names: Bally Total Fitness, Everlast, Valeo, and Body Fit Fitness Balls (collectively referred to as “exercise balls”), which were sold at department stores and fitness retailers nationwide from May 2000 to February 2009, for between \$15.00 and \$30.00. The exercise balls remain on the market.

5. The exercise balls are “consumer products” and, at all relevant times, EB imported and distributed the exercise balls. Therefore, EB was a “manufacturer” of these consumer products, which were “distributed in commerce,” as those terms are defined or used in sections 3(a)(5), (8), and (11) of the CPSA, 15 U.S.C. § 2052(a)(5), (8), and (11).

6. The exercise balls are defective because they can rupture and/or explode when overinflated by consumers, thereby posing a falling hazard to consumers.

7. EB received its first report of an incident involving a burst exercise ball in January 2004.

8. By 2007, EB knew of approximately 25 reports of incidents involving bursting exercise balls. In 20 of those incidents, the bursting exercise balls were alleged to have caused various injuries, most of them minor.

9. Despite being aware of the information set forth in paragraphs 6 through 8, EB did not report to the Commission until October of 2008. By that time, EB was aware of at least 44 reports of incidents involving bursting exercise balls, which were alleged to have caused physical injuries, most of them minor, to 29 consumers. In April 2009, Commission staff and EB agreed that EB would revise its existing warning labels to consumers advising against

overinflating the exercise balls. No other changes to the label, warnings, or instructions, or to the specifications, composition, or manufacturing process were recommended.

10. Although EB had obtained sufficient information to reasonably support the conclusion that the exercise balls either contained a defect which could create a substantial product hazard, or created an unreasonable risk of serious injury or death, EB failed to immediately inform the Commission of such defect or risk, as required by sections 15(b)(3) and (4) of the CPSA, 15 U.S.C. § 2064(b)(3) and (4). In failing to report immediately to the Commission, EB knowingly violated section 19(a)(4) of the CPSA, 15 U.S.C. § 2068(a)(4) as the term “knowingly” is defined in section 20(d) of the CPSA, 15 U.S.C. § 2069(d).

11. Pursuant to section 20 of the CPSA, 15 U.S.C. § 2069, EB is subject to civil penalties for its failure to immediately report to the Commission, as required under section 15(b) of the CPSA, 15 U.S.C. § 2064(b).

RESPONSE OF E&B GIFTWARE, LLC (on behalf of EB)

12. EB denies the allegations of Staff that the exercise balls contain a defect which could create a substantial product hazard or create an unreasonable risk of serious injury or death. Furthermore, it denies that it violated the reporting requirements of Section 15(b) of the CPSA, 15 U.S.C. § 2064(b).

13. Exercise balls are manufactured from plastic material that is inflated. All exercise balls can be damaged and/or burst when they are subject to abuse or misuse. The mere fact that an exercise ball is reported to burst does not indicate that the exercise ball is defective. The number of complaints of burst exercise balls received by EB was very small, constituting only

approximately .0015 percent of all exercise balls sold by EB. The injuries reported were minor, and the injuries were consistent with those expected when people fall off of exercise equipment.

14. EB investigated the complaints and reports received about bursting balls, and it conducted tests of the exercise balls. The exercise balls passed all of the tests to which they were subjected; no manufacturing flaws could be identified; and there was no indication that the balls were defective. The investigations did not reveal that the exercise balls contained a defect.

15. EB did not knowingly fail to report to the Commission. To the contrary, EB voluntarily filed a report with the Commission even though the testing concluded that the exercise balls did not burst when used as directed by the instructions.

AGREEMENT OF THE PARTIES

16. Under the CPSA, the Commission has jurisdiction over this matter and over E&B Giftware LLC and EB.

17. In settlement of Staff's allegations, E&B or an affiliate shall pay a civil penalty in the amount of five hundred and fifty thousand dollars (\$550,000.00), with \$50,000.00 of that sum suspended. The civil penalty is payable within twenty (20) calendar days of E&B or an affiliate receiving service of the Commission's final Order accepting the Agreement. The payment shall be made by electronic payment via www.pay.gov.

18. The parties agree that in consideration of this suspension of the above-referenced portion of the penalty amount, E&B will provide the CPSC with evidence of its program to comply with the reporting requirements of section 15(b) of the Consumer Product Safety Act, 15 U.S.C. §2064(b), including Standard Operating Procedures and training materials in the possession of, or created by, E&B.

19. The parties agree that if E&B fails to provide evidence of a compliance program within 20 days after the date this agreement becomes final, fails to pay the \$500,000 civil penalty by the date designated, or commits a violation of 15 U.S.C. §§ 2051, *et seq.*, within two years of the date this agreement becomes final, such conduct will be considered a violation of this Agreement and Order, and the \$50,000 suspended portion of the civil penalty will be immediately due and payable, along with interest accrued at the rate specified in accordance with the Order in this case.

20. The parties enter into this Agreement for settlement purposes only. The Agreement does not constitute an admission by either EB or E&B, or a determination by the Commission that EB or E&B violated the CPSA's reporting requirements. Upon issuance of, and E&B's compliance with, the final Order, the Commission regards this matter as resolved and agrees not to bring a civil penalty action, or other enforcement action against EB, E&B, or any of their directors, officers, agents, employees, representatives, successors, assigns, or any person in active concert and participation with any of them, based on Staff's allegations, set forth above, regarding the exercise balls.

21. Upon provisional acceptance of the Agreement by the Commission, the Agreement shall be placed on the public record and published in the *Federal Register*, in accordance with the procedures set forth in 16 C.F.R. § 1118.20(e). If the Commission does not receive any written request not to accept the Agreement within fifteen (15) calendar days, the Agreement shall be deemed finally accepted on the 16th calendar day after the date it is published in the *Federal Register*, in accordance with 16 C.F.R. § 1118.20(f).

22. Upon the Commission's final acceptance of the Agreement and issuance of the final Order, EB, E&B and any affiliate knowingly, voluntarily, and completely waives any rights

it may have in this matter to the following: (i) an administrative or judicial hearing; (ii) judicial review or other challenge or contest of the Commission's actions; (iii) a determination by the Commission as to whether EB, E&B or any affiliate failed to comply with the CPSA and the underlying regulations; (iv) a statement of findings of fact and conclusions of law; and (v) any claims under the Equal Access to Justice Act.

23. The Agreement and the Order shall apply to, and be binding upon, EB, E&B Giftware LLC, and each of its successors and/or assigns.

24. The Commission issues the Order under the provisions of the CPSA, and a violation of the Order may subject EB, E&B and each of its successors and assigns to appropriate legal action.

25. The Agreement may be used in interpreting the Order. Understandings, agreements, representations, or interpretations apart from those contained in the Agreement and the Order may not be used to vary or contradict their terms. The Agreement shall not be waived, amended, modified, or otherwise altered without written agreement thereto, executed by the party against whom such waiver, amendment, modification, or alteration is sought to be enforced.

26. If any provision of the Agreement and the Order is held to be illegal, invalid, or unenforceable under present or future laws effective during the terms of the Agreement and the Order, such provision shall be fully severable. The balance of the Agreement and the Order shall

remain in full force and effect, unless the Commission, EB and E&B agree that severing the provision materially affects the purpose of the Agreement and Order.

E & B GIFTWARE LLC

Dated: December 1, 2011

By: _____
David Mauer, Chief Executive Officer
E & B GIFTWARE LLC
4 Executive Plaza
Yonkers, NY 10701

Dated: December 1, 2011

By: _____
Kate Beardsley, Esq.
Zuckerman Spaeder LLP
1800 M Street, N.W.
Suite 1000
Washington, D.C. 20036-5807

U.S. CONSUMER PRODUCT SAFETY
COMMISSION STAFF

Cheryl A. Falvey
General Counsel

Mary B. Murphy
Assistant General Counsel
Office of the General Counsel

Dated: December 1, 2011

By: _____
Regan A. Sweeney, Trial Attorney
Division of Compliance
Office of the General Counsel

**UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION**

In the matter of:

E & B GIFTWARE LLC

CPSC Docket No.: 12-C0005

ORDER

Upon consideration of the Settlement Agreement entered into between E&B Giftware LLC (“E&B”) and U.S. Consumer Product Safety Commission (“Commission”) staff, and the Commission having jurisdiction over the subject matter and over E&B, and it appearing that the Settlement Agreement and the Order are in the public interest, it is

ORDERED that the Settlement Agreement be, and hereby is, accepted; and it is

FURTHER ORDERED that E&B shall pay a civil penalty in the amount of five hundred fifty thousand dollars (\$550,000.00), of which \$50,000 shall be suspended, within twenty (20) days of service of the Commission’s final Order accepting the Settlement Agreement. The payment shall be made via www.pay.gov. Upon the failure of E&B to make the foregoing payment of \$500,000 when due, interest on the unpaid amount shall accrue and be paid by E&B at the federal legal rate of interest set forth at 28 U.S.C. § 1961(a) and (b). In the event that E&B fails to make such payment, fails to provide evidence of their compliance program, as specified in the agreement, or commits another violation of 15 U.S.C. §§ 2051, *et seq.*, within two years of the date this agreement becomes final, the suspended portion of the civil penalty will be due and payable immediately, along with interest on the unpaid amount and

will accrue and be paid by E&B at the federal legal rate of interest set forth at 28 U.S.C. § 1961(a) and (b).

Provisionally accepted and provisional Order issued on the 19th day of December, 2011.

BY ORDER OF THE COMMISSION:

Todd A. Stevenson, Secretary
U.S. Consumer Product Safety Commission

[FR Doc. 2011-32861 Filed 12/21/2011 at 8:45 am; Publication Date: 12/22/2011]